IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES OF AMERICA, *Petitioner*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Cross-Petitioner*

v.

UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTARY REPLY BRIEF OF FLORIDA EAST COAST RAILWAY COMPANY

In the Initial Brief of Florida East Coast Railway Company (No. 783), pp. 18, 29, reference was had to *Flight Engineers* v. *Eastern Air Lines*, 243 F. Supp. 701 (S.D.N.Y. 1965) and to the fact that an appeal was pending in the case. This case was decided on April 12, 1966 and the Opinion of the United States Court of Appeals for the Second Circuit follows:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 173—September Term, 1965.

(Argued January 4, 1966 Decided April 12, 1966.)

Docket No. 29997

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, EAL CHAPTER, AFL-CIO, *Appellant*,

v.

EASTERN AIR LINES, INC. and AIR LINE PILOTS ASSOCIATION, *Appellees*.

Before: MOORE, SMITH and ANDERSON, *Circuit Judges*.

Appeal from an order of the District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, granting summary judgment in favor of the defendants and directing the dismissal of plaintiff's amended or supplemental complaint for lack of jurisdiction over the subject matter. Affirmed.

I. J. GROMFINE, Washington, D. C. (Herman Sternstein, William B. Peer, and Zimring, Gromfine & Sternstein, all of Washington, D. C., and Patt & Heimowitz, New York, N. Y., with him on the brief), *for appellant*.

GEORGE G. GALLANTZ, New York, N. Y. (Larry M. Lavinsky, Saul G. Kramer, and Proskauer Rose Goetz & Mendelsohn, all of New York, N. Y.; W. Glen Harlan and Gambrell, Harlan, Russell & Moye, Atlanta, Ga.; with him on the brief), *for appellee Eastern Air Lines*.

HERBERT A. LEVY, New York, N. Y. (Henry Weiss and Cohen and Weiss, all of New York, N. Y., with him on the brief), *for appellee Air Line Pilots Association*.

MOORE, *Circuit Judge:*

This appeal presents another facet of the drawn-out controversy between the defendant Eastern Air Lines, Inc.

(Eastern), the plaintiff Flight Engineers International Association, EAL Chapter, AFL-CIO (FEIA), and the defendant Air Line Pilots Association (ALPA). Portions of the controversy have previously come before the Civil Aeronautics Board, the National Mediation Board, and a variety of courts.

The opinion of the District Court ably sets forth the background of the dispute. 243 F. Supp. 701 (S.D.N.Y. 1965). Only the barest summary is necessary here.

Federal regulations require a crew of three—a pilot, a copilot, and a certified flight engineer—in certain of the larger commercial aircraft. ALPA, which represented Eastern's pilots and copilots, and FEIA, which represented Eastern's flight engineers, clashed in 1958 over the license requirements of the flight engineer, the "third man in the cockpit." FEIA maintained that he should hold a mechanic's license (A & E license), held by FEIA members but not generally held by ALPA members. ALPA maintained that he should hold a pilot's license (P & I license), held by ALPA members but not generally held by FEIA members. After a strike by FEIA, Eastern agreed to a four-man crew, one member of which had to have a mechanic's license but did not have to have a pilot's license. This arrangement continued until 1962, with occasional strikes by FEIA and repeated attempts by presidential commissions and boards to solve the underlying problem of who should fill the third seat in the cockpit.

On June 23, 1962, FEIA again went out on strike, causing Eastern to shut down operations. In mid-July Eastern offered to give pilot's training to FEIA flight engineers so that they would be eligible for occupancy of the third seat. FEIA did not accept the offer within the time set. Eastern then made the same offer individually to each of the striking engineers, informing them that if they did not report to work by July 24th, they might be replaced. On August 10, 1962, Eastern made a final proposal to the striking flight

engineers, promising them prior job rights on propeller equipment but not on jets, and stating that those who did not accept the offer by August 16th would lose all prior job rights. Under the terms of agreements which Eastern reached with ALPA during this period, pilots who applied for the position of "pilot engineer"—the new title given to occupants of the third seat in the cockpit—would suffer no loss of their pilot seniority.

On August 10th, Eastern began to replace the striking flight engineers with ALPA pilots and on August 25th Eastern notified all flight engineers still out on strike that they had been permanently replaced. FEIA and some of the striking flight engineers wrote Eastern on August 27, 1962, demanding that their discharge be processed as a grievance under the FEIA-Eastern collective bargaining agreement. Eastern rejected these demands on the grounds that the bargaining agreement had been terminated.

On September 27, 1962, FEIA offered to end the strike along the lines of settlement proposed by Eastern in July, provided that striking flight engineers could return to work in order of seniority. Eastern declined on the grounds that the strikers had been permanently replaced, so that there was no basis for further negotiation.

On September 28, 1962, FEIA informed Eastern that it would raise the replacement of the flight engineers as a formal grievance before the System Board of Adjustment established by the parties under the Railway Labor Act. Eastern refused to participate. As a result, the Mediation Board did not appoint a neutral member to the System Board of Adjustment.

Previous Litigation

FEIA has been seeking redress from Eastern and ALPA, together or separately, before a range of administrative and judicial bodies since the summer of 1962, for wrongs

alleged to have been committed during the summer of 1962. The history of these efforts is necessary to the resolution of the problem before us.

In the union's first attempt at administrative review, FEIA filed a complaint with the CAB alleging that Eastern had violated Section 410(k)(4) of the Federal Aviation Act, 49 U.S.C. § 1371(k)(4), which makes compliance with the Railway Labor Act a condition for the holding of a certificate by an air carrier. The complaint alleged a number of violations of the Railway Labor Act by Eastern. The CAB dismissed the complaint, partly on the grounds that similar grievances were the basis of pending actions in the courts, and partly because the uncertain nature of the FEIA representation of the flight engineers was a question for the National Mediation Board to decide. The Court of Appeals for the District of Columbia Circuit held that this dismissal was not an abuse of discretion by the CAB, although the Court indicated that it believed the CAB had some independent jurisdiction to decide whether the Railway Labor Act had been violated. 332 F. 2d 317 (D.C. Cir. 1964).

In 1964 FEIA sought a preliminary injunction to enjoin the National Mediation Board from holding an election to determine the bargaining representative of the flight engineers then working for Eastern, on the grounds that in determining who was qualified to vote in the representation election, the National Mediation Board had refused to investigate FEIA's charges of unfair labor practices. The district court held that the Mediation Board was under no duty to hold hearings on such charges. 230 F. Supp. 611 (D.D.C. 1964). The Court of Appeals affirmed, indicating that the Mediation Board had made some investigation as to the voting rights of the ALPA pilots who had replaced FEIA engineers. 338 F. 2d 280 (D.C. Cir. 1964).

In the summer of 1962 FEIA brought suit in the Southern District of New York, seeking a preliminary injunction

against Eastern on the grounds that Eastern had failed to bargain as required by the Railway Labor Act, and had bargained improperly by withdrawing earlier offers to the union and by writing to the individual employees. The district court denied the relief requested on the grounds that FEIA had shown no clear and convincing evidence of unfair labor practices and had not demonstrated a reasonable probability of success after trial. This court affirmed on the opinion below. 208 F. Supp. 182 (S.D.N.Y.), *aff'd per curiam*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963).

FEIA started the present suit against Eastern and ALPA in the Southern District of New York on August 21, 1962, requesting that the defendants be preliminarily enjoined from alleged violations of the Railway Labor Act. The district court found on the merits that the procedures for bargaining under the Act had been exhausted so that the parties were free to resort to economic self-help; that Eastern had bargained in good faith with FEIA; and that Eastern had not conspired with ALPA against FEIA. The court denied the request for a preliminary injunction on the grounds that FEIA had not shown a reasonable chance of success at a full trial. 45 CCH Lab. Cas. ¶ 17,814 (1962). This court affirmed on the ground that since the case involved problems of representation and problems of jurisdiction between labor unions, the district court was without jurisdiction to grant the relief which the plaintiff sought. 311 F. 2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963). In February 1964 FEIA filed an amended or supplemental complaint against Eastern and ALPA, requesting not only an injunction against Eastern ordering it to recognize FEIA as the exclusive bargaining representative of the flight engineers, but also a declaratory judgment declaring that the many agreements between Eastern and ALPA (November 12, 1958, January 1, 1959, July 20, 1962, August 3, 1962, and August 6, 1962) were void and unenforceable; a mandatory injunction directing that Eastern reinstate the

striking FEIA flight engineers without prejudice, "ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers"; and a judgment for damages of $11,500,000, together with a similar sum "as exemplary damages."

Both defendants moved for summary judgment dismissing the amended complaint on the ground that the court was without jurisdiction to grant the relief requested. The district court granted the defendants' motions, partly on the ground that there was no evidence of violations of the act and partly on the ground that the district court lacked jurisdiction of the subject matter. 243 F. Supp. 701 (S.D. N.Y. 1965).

Much of the original complaint survives unaltered in its amended successor; and the passage of time has made these portions of the complaint no more a subject for judicial relief than they were at the time of the previous appeal. They still involve jurisdictional and representational disputes between the two unions—disputes which, under the Railway Labor Act, are "for non-curial treatment." *FEIA* v. *Eastern Air Lines,* 311 F. 2d 745 at 748 (2d Cir.), *cert. denied,* 373 U.S. 924 (1963).

The amended complaint contains several new allegations: that the striking FEIA members were wrongfully discharged; that Eastern unlawfully conditioned the strikers' return to work on their relinquishment of seniority rights, and unlawfully gave superseniority to the ALPA replacements; and that Eastern unlawfully refused to process the grievances of the discharged employees and prevented the effective review of those grievances by the System Board of Adjustment.

These so-called new allegations (the replacement of the strikers, the demand for reinstatement of the discharged engineers and money damages) must be examined in the light of the many previous proceedings and decisions in-

volving the controversies between Eastern, FEIA and ALPA as to the pilot-engineer status in the cockpit.

FEIA concedes that the determination of which union is to represent the occupants of the third seat in the cockpit is left to the National Mediation Board by Section 2, Ninth, of the Railway Labor Act. The National Mediation Board has made this determination. After deciding that both the strikers and their replacements could vote to choose a bargaining representative, it conducted a representation election, as a result of which it certified ALPA as the bargaining representative of the occupants of the third seat.

The allegations in the amended complaint which relate to the replacement of the strikers do not directly challenge the representational decision of the Mediation Board; but the judicial relief requested by FEIA flies "in the teeth of the board's certification" of ALPA, almost as much as a court order directing an employer not to bargain with a union flies in the teeth of the board's certification of that union. *Order of Railway Conductors* v. *Pennsylvania R.R.*, 323 U.S. 166, 172 (1944). As the complaint itself recognizes, Eastern could afford to reinstate five hundred striking FEIA members only if it dismissed a comparable number of their replacements, most of whom voted for ALPA. The result would be a radical shift in the composition of the work force which might well make possible the ouster of ALPA by FEIA as the bargaining representative of the third-seat occupants.

The claim for money damages would have a similar effect. If granted in anything like the amounts requested, employers in similar situations in the future would never care to deal with unions newly certified by the National Mediation Board, until they could obtain declaratory judgments from the courts as to the validity of the ousted union's claims that the Railway Labor Act had been violated—a result which would clash with the evident con-

gressional intent to have disputed questions of representation in an industry so charged with the public interest disposed of rapidly. See *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 256 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964).

We do not mean to say that courts may never consider claims that the Railway Labor Act has been violated, if two unions are present. The second *Ruby* case makes clear that even if two unions are on the scene, such claims may be heard by the courts in certain circumstances. *Ruby* v. *American Airlines*, 329 F. 2d 11 (2d Cir. 1964), *vacated as moot sub nom. O'Connell* v. *Manning*, 381 U.S. 277 (1965). But in that case, the issue was whether a court could order an employer to bargain with a union (the one most recently certified by the National Mediation Board); and that issue had been heard by no other court or administrative body. The allegations here more directly affect questions of representation; the relief requested, if granted, would to a large extent conflict with the certification of ALPA by the board; and many of the questions presented have previously been considered on the merits by the courts.

FEIA maintains broadly that Congress did not intend in the Railway Labor Act to create rights without remedies, and that as a result courts should step in to hear Railway Labor Act complaints where administrative agencies have declined to do so. The law is not that simple; nor is its application to the facts of this case. The Mediation Board considered the legality of the replacement of the strikers, at least to the extent of holding that the replacements were entitled to vote in the representational election. See *FEIA* v. *National Mediation Board*, 338 F. 2d 280, 282 (D.C. Cir. 1964).

Judge Levet found that the third seat positions on Eastern's jets were filled by replacements before Eastern's letter of August 8, 1962. This finding cuts the heart out of

FEIA's argument that Eastern unfairly discriminated against the strikers by denying them access to work on jets. Judge Levet also found Eastern's temporary contracts with ALPA were fair, and that Eastern had completely and permanently replaced all the strikers by August 25, 1962—a finding inconsistent with FEIA's present claim that its members were discharged before they had been replaced. 45 CCH Lab. Cas. ¶ 17,814 (1962).

Moreover, it seems clear that Congress did not intend courts to hear claims under the Act whenever no administrative body would hear them. In certain narrow areas, where the command of the statute is clear and the issue does not impinge on one committed for resolution to other bodies, judicial enforcement of the Railway Labor Act has been held proper. E.g., *Virginian R'y* v. *System Federation No. 40*, 300 U.S. 515 (1937). Courts may also require the Mediation Board to carry on its statutory duties to investigate and to certify. *Air Line Dispatchers Association* v. *National Mediation Board*, 189 F. 2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951). But the history of the Railway Labor Act, as interpreted by the Supreme Court, makes clear that in all other areas,

> "the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration . . . Courts should not rush in where Congress has not chosen to tread."

General Committee of Adjustment v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 337 (1943).

To grant the judicial relief requested in FEIA's wholesale attack on the replacement of the strikers would directly affect the previous determination of the representational dispute by the National Mediation Board;[1] would reopen a controversy which has plagued the airlines for years and which has been fought to a rough conclusion by resort to the self-help envisaged by the act; and would lay down a precedent that would mean the inordinate protraction of comparable struggles in years to come. For these reasons, we do not feel that courts should consider the claims for judicial relief in FEIA's amended complaint which are directly connected with the replacement of the strikers.

The last of the new allegations in the amended complaint, concerning Eastern's refusal to process grievances and its paralyzing of the System Board of Adjustment, raises somewhat different problems.

The facts underlying FEIA's allegation are as follows. After Eastern told the striking engineers that they had been permanently replaced, FEIA and some of the strikers requested that the discharge of the engineers be processed as a grievance under the FEIA-Eastern collective bargaining agreement. Eastern refused to do so on the theory that the agreement had been terminated. The union attempted to bring the matter before the System Board of Adjustment, but the System Board split 2-2 on the problem. The collective bargaining agreement provided that if the System Board could not agree within a certain time, "it shall request the National Mediation Board to name a referee." Only the employee members of the System Board requested the naming of a referee, and the Mediation Board held that it had no power to name a referee under the cir-

[1] As the trial court stated in its opinion, "Moreover, to entertain FEIA's claims for reinstatement of its members would be to bring into issue the certification of the Mediation Board of ALPA as the bargaining agent for Eastern's flight engineers." (243 F. Supp. at 707.)

cumstances. The District Court for the District of Columbia upheld the position of the Mediation Board. *FEIA* v. *National Mediation Board*, 230 F. Supp. 611 (D.D.C.), *aff'd on other grounds*, 338 F. 2d 280 (D.C. Cir. 1964). FEIA maintains that Eastern's refusal to join in the request for the appointment of a neutral referee was in violation of Eastern's duty under Section 204 of the Railway Labor Act "to establish a board of adjustment."

This issue is properly one for judicial consideration, since the relief requested is not the circumvention of the act's provisions for adjustment and mediation, but rather the enforcement of those provisions. *IAM* v. *Central Airlines, Inc.*, 372 U.S. 682, 690 (1963); *Aaxico* v. *Air Line Pilots Association*, 331 F. 2d 433, 437 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964); cf. *Virginian R'y* v. *System Federation No. 40*, 300 U.S. 515 (1937). However, we agree with the trial court that since the collective bargaining agreement between the parties had terminated, Eastern was no longer under any obligation to process as grievances the allegations of the union, or to maintain the System Board of Adjustment for the resolution of the claims here asserted by the Union.

As the Supreme Court made clear in *IAM* v. *Central Airlines*, 372 U.S. 682, 690 (1963), "the extent and nature of the legal consequences" (*Deitrick* v. *Greaney*, 309 U.S. 190, 200-201) of the duty to establish a board of adjustment under Section 204 are to be determined by the courts. In making this determination, we must bear in mind the intended function of the System Boards of Adjustment: to resolve minor disputes, i.e., disputes as to the interpretation and application of existing contracts, as opposed to "major disputes connected with a negotiation of contracts or alterations in them" (687), which the Act leaves for resolution to the processes of mediation. See *Elgin, J. & E. R'y* v. *Burley*, 325 U.S. 711, 722-24 (1945). The Act's provisions for boards of adjustment serve the same function as provisions for arbitration under the typical collective bargaining agreement—a means for deciding "the

smaller differences which inevitably appear in the carrying out of major agreements . . ." 325 U.S. at 724.

As long as it appears that the underlying collective bargaining agreement is still in effect, all disputes as to grievances and their processing should be solved by resort to the System Board of Adjustment, and courts will not permit this machinery to be paralyzed by unilateral action on the part of either the carrier or the representatives of the employees. See *IAM* v. *Central Airlines, supra; Aaxico* v. *ALPA, supra.*

The collective bargaining agreement between Eastern and FEIA was signed on December 31, 1958. By its terms, it was to continue in force until April 1, 1960, renewable thereafter on a yearly basis until notice of a desire to change the agreement was served by either party on the other prior to April 1st of any year. Such a notice was sent by FEIA on February 8, 1960. Negotiations between the parties continued intermittently until February 1962, and were followed by the appointment of a presidential emergency board under Section 10 of the Act. The Board filed its report to the President on May 1, 1962, and the freezing of the situation which had been caused by the appointment of the emergency board ended thirty days later. After June 1, 1962, the contract was no longer in effect and the union was free to strike. *FEIA* v. *Eastern Air Lines*, 208 F. Supp. 182 (S.D.N.Y.), *aff'd per curiam*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963). Unlike the collective bargaining agreement considered in *Manning* v. *American Airlines*, 329 F. 2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964), the status quo provisions of the Railway Labor Act had ceased to operate. Nor does FEIA suggest the existence of any conduct on the part of both parties which could serve as the basis for an argument that the parties had agreed to keep the former contract in effect although it was extinct by its own terms. The time for economic warfare had arrived, and the battle was not slow in coming.

Under such circumstances, what purpose could be served by maintaining the System Board of Adjustment? Presumably, it was still the appropriate forum for the assertion of rights which had arisen while the collective bargaining agreement was still in effect, see *Elgin, J. & E. R'y* v. *Burley*, 325 U.S. 711, 723 (1945). Conceivably it was the appropriate forum to consider the fairness of disciplinary action against the strikers, if a new agreement eventually was reached between Eastern and FEIA. *International Air Line Pilots Ass'n* v. *Southern Airways, Inc.*, 44 CCH Lab. Cas. ¶ 17,460 (M.D. Tenn. 1962). But no such rights are asserted here. The only "grievances" are those arising from the replacement *en masse* of the strikers, which began after the agreement had ceased to be effective. Even if we assumed that this issue, despite its large scale, would have been a "minor" dispute to be resolved by the System Board had the agreement remained in effect, the agreement was no longer in effect. All-out economic war had begun, and the replacements were Eastern's answer to FEIA's strike. Under such circumstances, Eastern was not under an obligation to maintain the System Board so that it could hear disputes of this sort. Cf. *Manning* v. *American Airlines*, 221 F. Supp. 301 (S.D.N.Y. 1963), *aff'd*, 329 F. 2d 32 (2d Cir.), *cert. denied*, 379 U.S. 817 (1964).

In summary, FEIA bases its appeal largely upon the theory that there were genuine issues of material facts relating to (1) the discharge of FEIA engineers and their replacement by ALPA pilots; (2) Eastern's refusal to bargain in good faith; and (3) Eastern's efforts to promote ALPA as the bargaining agent instead of FEIA. However, the trial court has found that "since the agreement between Eastern and FEIA was no longer in force, Eastern was under no obligation to re-employ all the strikers" (243 F. Supp. at 708). The court concluded that the "additional claims advanced by FEIA do not change the nature of the controversy as found by the Court of Appeals" (p. 708). As to reinstatement and damages, it would follow, as the trial court held, that "since the Court is without juris-

diction of the subject matter, it is equally without jurisdiction to direct the reinstatement of the strikers or to award damages" (p. 708).

Although there may be interesting factual issues which FEIA might desire to explore, in view of the previous decisions they do not qualify as "material" facts. The trial court, therefore, was justified in deciding this case upon the motion for summary judgment "for lack of jurisdiction over the subject matter."

Affirmed.

Florida East Coast Railway Company submits that this case is squarely in point and fully supports the position it has advanced herein.

Respectfully submitted,

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April 18, 1966

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[2] *IAM* v. *International Aircraft Services*, 302 F. 2d 808 (4th Cir. 1962), on which FEIA relies, is readily distinguishable. In that case, arising not under the Railway Labor Act but under the National Labor Relations Act, the court held that an employer could not avoid a duty to arbitrate grievances with a union on the grounds that the union, because of the employer's allegedly unlawful replacement of union members, no longer represented a majority of the work force. Apart from the obvious differences between the breadth of the arbitration clause, there in question and the jurisdiction of the boards of adjustment under the Railway Labor Act, the union and the employer there had entered into a new collective bargaining agreement which was explicitly made retroactive to the termination date of the old agreement.

SUPREME COURT OF THE UNITED STATES

Nos. 750, 782, AND 783.—OCTOBER TERM, 1965.

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL–CIO, et al., Petitioners, 750 *v.* Florida East Coast Railway Company. United States, Petitioner, 782 *v.* Florida East Coast Railway Company. Florida East Coast Railway Company, Cross-Petitioner, 783 *v.* United States.	On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 23, 1966.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This controversy started with a union demand on behalf of the nonoperating employees for a general 25-cent-per-hour wage increase and a requirement of six months' advance notice of impending layoffs and abolition of job positions. The demand was made of virtually all Class I railroads, including Florida East Coast R. Co. (hereinafter called FEC). The dispute underwent negotiations and mediation as required by the Railway Labor Act.[1] When those procedures proved unsuc-

[1] § 6, 44 Stat. 582, as amended, 48 Stat. 1197, 45 U. S. C. § 156; § 5, First, 44 Stat. 580, as amended, 48 Stat. 1195, 45 U. S. C. § 155, First (1964 ed.).

cessful, a Presidential Emergency Board was created under § 10 of the Act,[2] which after hearings recommended a general pay increase of about 10 cents per hour and a requirement of at least five days' notice before job abolition. In June 1962, this settlement was accepted by all the carriers except FEC. Thereupon, further mediation was invoked under the Act but again no settlement was reached. The Act makes no provision for compulsory arbitration. Section 5, First,[3] does, however, provide for voluntary arbitration at the suggestion of the Mediation Board. The suggestion was made but both the unions and FEC refused. Further negotiations were unsuccessful and on January 23, 1963, the nonoperating unions struck. When that happened, most operating employees refused to cross the picket lines.

FEC shut down for a short period; and then on February 3, 1963, resumed operations by employing supervisory personnel and replacements to fill the jobs of the strikers and of those operating employees who would not cross the picket lines. FEC made individual agreements with the replacements concerning their rates of pay, rules and working agreements on terms substantially different from those in the outstanding collective bargaining agreements with the various unions. Thereafter, FEC proposed formally to abolish all the existing collective bargaining agreements and to substitute another agreement that would make rather sweeping departures in numerous respects from the existing collective agreements. Negotiations between FEC and the unions broke down. The unions then invoked the mediation services of the National Mediation Board relative to the proposed changes, but the carrier refused. The

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[2] 44 Stat. 586–587, 45 U. S. C. § 160 (1964 ed.).

[3] 44 Stat. 580, as amended, 48 Stat. 1195, 45 U. S. C. § 155, First (1964 ed.).

unions thereafter agreed to submit the underlying dispute—the one concerning wages and notice—to arbitration. But FEC refused arbitration and shortly thereafter established another new agreement by unilateral action and operated under it until the present action was instituted by the United States in 1964—a suit charging that the unilateral promulgation of the new agreement violated the Act.[4] The nonoperating unions intervened as plaintiffs and hearings were held. Meanwhile, the Court of Appeals decided *Florida East Coast R. Co.* v. *Brotherhood of R. Trainmen*, 336 F. 2d 172, a parallel injunctive suit brought against FEC by an operating union and similarly complaining of FEC's unilateral promulgation of the new agreement. That court held that FEC had violated the Act by its unilateral abrogation of the existing collective agreements. It ruled, however, that FEC could unilaterally institute such changes in its existing agreements as the District Court found to be "reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F. 2d, at 182. The District Court thereafter entered injunctions in the *Trainmen's* case, and in the present case, requiring FEC to abide by all the rates of pay, rules, and working conditions specified in the existing collective bargaining agreements until the termination of the statutory mediation procedure "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court."

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[4] We have no doubt that the United States had standing to bring this action. Section 2, Tenth, 48 Stat. 1189, 45 U. S. C. § 152, Tenth, makes it the duty of the United States attorney to "institute in the proper court and to prosecute . . . *all necessary proceedings* for the enforcement" of § 2 (emphasis added) which FEC is here charged with violating. See *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 491–492.

Thereupon FEC filed an application for approval of some departures from its existing agreement with its nonoperating unions. The District Court, after hearings, granted some requests and denied others. Thus it permitted FEC to exceed the ratio of apprentices to journeymen and age limitations established by the collective agreement to contract out certain work, and to use supervisory personnel to perform certain specified jobs where it appeared that trained personnel were unavailable. The District Court denied FEC's request that it be permitted to disregard completely craft and seniority district restrictions, that it be allowed to use supervisors to perform craft work whenever it desired, that it be relieved of the duty to provide seniority rosters, that it be permitted to contract out work whenever trained personnel were unavailable, and that the union shop be declared void and unenforceable as to employees hired after January 23, 1963. Both sides appealed. The Court of Appeals affirmed on the basis of its decision in the *Trainmen's* case. 348 F. 2d 682. The unions, the United States, and FEC each petitioned for a writ of certiorari which we granted. 382 U. S. 1008.

The controversy centers around § 2, Seventh, of the Act,[5] which provides:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

The demand for a 25-cents-per-hour wage increase and for six months' advance notice of impending lay-offs and job abolitions was a major dispute covered by § 2, Seventh (*Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 723) and it had proceeded through all the major dispute pro-

[5] 48 Stat. 1188, 45 U. S. C. § 152, Seventh (1964 ed.).

cedures required by the Act without settlement. The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided.

At that junction self-help was also available to the carrier as we held in *Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U. S. 284, 291: ". . . both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute. . . ."

The carrier's right of self-help is underlined by the public service aspects of its business. "More is involved than the settlement of a private controversy without appreciable consequences to the public." *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. The Interstate Commerce Act places a responsibility on common carriers by rail to provide transportation.[6] The duty runs not

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[6] 49 U. S. C. § 1 (4) provides in part:

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; . . ."

49 U. S. C. § 1 (11) provides in part:

"It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; . . ."

49 U. S. C. § 8 provides in part:

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter. . . ."

to shippers alone but to the public. In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers was stopped. Food and other critical supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed.

We emphasize these aspects of the problem not to say that the carrier's duty to operate is absolute, but only to emphasize that it owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been exhausted and self-help becomes available to both sides of the labor-management controversy.

If all that were involved were the pay increase and the notice to be given on lay-offs or job abolition, the problem would be simple. The complication arises because the carrier, having undertaken to keep its vital services going *with a substantially different labor force,* finds it necessary or desirable to make other changes in the collective bargaining agreements. Thus we find FEC in this case anxious to exceed the ratio of apprentices to journeymen and the age limitations in the collective agreements, to make changes in the contracting-out provisions, to disregard requirements for trained personnel, to discard craft and seniority restrictions, the union shop provision, and so on. Each of these technically is included in the words "rules, or working conditions of its employees, as a class, as embodied in agreements" within the meaning of § 2, Seventh, of the Act. It is, therefore, argued with force that each of these issues must run the same gantlet of negotiation and mediation, as did the pay and notice provisions that gave rise to this strike.

The practical effect of that conclusion would be to bring the railroad operations to a grinding halt. For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute. If, therefore, § 2, Seventh, is applicable after a lawful strike has been called and after lawful self-help has been invoked by the carrier, the right of self-help might well become unilateral to the workers alone, and denied the carrier. For when a carrier improvises and employs an emergency labor force it may or may not be able to comply with the terms of a collective bargaining agreement, drafted to meet the sophisticated requirements of a trained and professional labor force. The union remains the bargaining representative of all the employees in the designated craft, whether union members or not. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. All these employees of the railroad are entitled to the benefits of the collective bargaining agreement, and the carrier may not supersede the agreement by individual contracts even though particular employees are willing to enter into them. See *Telegraphers* v. *Ry. Express Agency*, 321 U. S. 342, 347. But when a strike occurs, both the carrier's right of self-help and its duty to operate, if reasonably possible, might well be academic if it could not depart from the terms and conditions of the collective bargaining agreement without first following the lengthy course the Act otherwise prescribes.

At the same time, any power to change or revise the basic collective agreement must be closely confined and supervised. These collective agreements are the product of years of struggle and negotiation; they represent the rules governing the community of striking employees and the carrier. That community is not destroyed by the strike, as the strike represents only an interruption in the

continuity of the relation.[7] Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective agreement, labor-management relations would revert to the jungle. A carrier could then use the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work-rules so as to permit operation on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have a strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective agreement on terms most favorable to it. The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures.

While the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored.[8] The Court of Appeals used

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[7] In this connection, it bears emphasis that the District Court's authorization to deviate in part from the collective bargaining agreement would, as FEC readily concedes, terminate at the conclusion of the strike. At that time, the terms of the earlier collective bargaining agreement, except as modified by any new agreement of the parties, would be fully in force.

[8] If FEC had precipitated the strike by refusing to arbitrate, then it would be barred by *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U. S. 50, from obtaining injunctive relief in the courts since it would have failed to make "every reasonable effort" to settle the dispute within the meaning of § 8 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U. S. C. § 108. And we assume that seeking relief from provisions of the collective bargaining agreements would have fallen under the same ban. But in the instant case both FEC and

the words "reasonably necessary." We do not disagree, provided that "reasonably necessary" is construed strictly. The carrier must respect the continuing status of the collective agreement and make only those changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation. The collective agreement remains the norm; the burden is on the carrier to show the need for any alteration of it, as respects the new and different class of employees that it is required to employ in order to maintain that continuity of operation that the law requires of it.

Affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

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the unions refused voluntary arbitration and the strike followed. Later the unions changed their mind and agreed to arbitration, FEC refusing. But by then the strike was on and the right to "self-help" had accrued. If an issue concerning the good faith of a party in refusing a pre-strike opportunity to arbitrate were presented, different considerations would apply.

Moreover, since the justification for permitting the carrier to depart from the terms of the collective bargaining agreement lies in its duty to continue to serve the public, a district court called upon to grant a carrier's relief from provisions of the collective agreement should satisfy itself that the carrier is engaged in a good-faith effort to restore service to the public and not, *e. g.*, using the strike to curtail that service.

SUPREME COURT OF THE UNITED STATES

Nos. 750, 782, AND 783.—OCTOBER TERM, 1965.

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL–CIO, et al., Petitioners, 750 *v.* Florida East Coast Railway Company. United States, Petitioner, 782 *v.* Florida East Coast Railway Company. Florida East Coast Railway Company, Cross-Petitioner, 783 *v.* United States.	On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 23, 1966.]

MR. JUSTICE WHITE, dissenting.

The Act provides that until bargaining procedures are exhausted there shall be neither strikes nor changes in the contract. Section 2, Seventh (45 U. S. C. § 152, Seventh (1964 ed.)); § 5, First (45 U. S. C. § 155, First (1964 ed.)); § 6 (45 U. S. C. § 156 (1964 ed.)). Here, bargaining was exhausted only on wages and notice of layoffs and job abolition. At that point the union was free to strike and the carrier to make such changes as had been bargained for. The carrier was free to operate, if it could, but in my view only under the terms of the existing collective bargaining contract as modified with respect to those subjects on which the Act's procedures had been followed.